Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1617

JANENE RILEY, by and through
her mother and next friend,
DELORES RILEY, et al,

Petitioners,

v.

BETTY STEPHENS, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

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October Term, 1975

No. _____

JANENE RILEY, by and through
her mother and next friend,
DELORES RILEY, et al,

Petitioners,

v.

BETTY STEPHENS, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgment herein of the Supreme Court of Ohio, entered February 5, 1976.

OPINIONS BELOW

The Decision and Judgment Entry of the Court of Common Pleas of Warren County, Ohio, granting the Motion for Summary Judgment on behalf of the county officials and the Motion to Dismiss on behalf of the State officials, dated April 22, 1974, is printed in Appendix I hereto. The Judgment Entry reflecting the verdict of the jury in favor

of Petitioner Janene Riley, under Docket No. 31566 and 34679, as consolidated, in the Court of Common Pleas of Warren County, Ohio, in the sum of Two Million Dollars, dated May 13, 1974, is printed in Appendix G hereto. The Judgment Entry of the Court of Appeals for the First Appellate District of Ohio, under Docket No. CA-31, affirming the judgment of the Court of Common Pleas of Warren County, Ohio, dated September 25, 1975, and the Opinion of the Court of Appeals for the First Appellant District of Ohio, per Buzzard, J., are printed in Appendices D and C, respectively, attached hereto. The Entry of the Supreme Court of Ohio, dated February 5, 1976, dismissing for want of a constitutional question the appeal from the decision of the Court of Appeals for the First Appellate District of Ohio, is printed in Appendix A attached to this petition. The Notice of Appeal to the Supreme Court of the United States was filed in The Supreme Court of Ohio on May 3, 1976.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3). Rule 19 (1) of the Rules of the Supreme Court of the United States provides:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

QUESTION PRESENTED FOR REVIEW

May a state court apply the doctrine of sovereign immunity in dismissing the State of Ohio and its employees, Directors of the Department of Rehabilitation and Correction and of the Department of Mental Health and Mental Retardation, all past and present members of the Board of County Commissioners of Warren County, Ohio, all past and present members of the Warren County Board of Mental Retardation and Green Knoll School, without thereby denying the petitioners' right to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the United States Constitution?

CONSTITUTIONAL PROVISION

Fourteenth Amendment to the Constitution of the United States of America.

STATEMENT OF THE CASE

On February 22, 1968, Petitioner, Janene Riley, sustained injuries including the amputation of both of her legs as she was standing off the paved portion of State Highway 48 in Warren County, Ohio. She was struck by a school bus being operated by Respondent, Betty Stephens, the ownership, operation and maintenance of the bus and the payment of Stephens being under the direction, supervision and control of the Board of County Commissioners of Warren County, Ohio, the members of the Warren County Board of Mental Retardation, Green Knoll School and the auspices of the Department of Rehabilitation and Correction and Department of Mental Health and Mental Retardation of the State of Ohio.

The governmentally related defendants responded to the Petitioners' pleadings by filing a Motion for Summary

Judgment on behalf of the County officials and a Motion to Dismiss on behalf of the State officials. These motions were grounded on the doctrine of sovereign immunity and were granted, dismissing these respondents with prejudice.

Prior to the accident Stephens was operating the bus in a southerly direction and she was confronted by a fuel oil delivery truck which stopped suddenly in front of her causing her to take evasive action, and in so doing struck the minor petitioner. The oil truck was owned and operated by John C. Daunt who was found, by the verdict of the jury, to have been the agent and employee of Respondent, Loveland Oil Company, Inc., for whose negligence a verdict was rendered against it.

Trial of the action on the Third Amended Complaint was heard in May, 1974, resulting in a verdict in favor of the minor petitioner and her parents on their derivative claims against Respondents, Betty Stephens and Loveland Oil Company, Inc. Following disposition of the post trial motions of Loveland Oil Company, Inc., notice of appeal was timely filed and petitioners brought two Assignments of Error to the Court of Appeals for the First Appellate District of Ohio, including the question presented for review herein. The Court of Appeals for the First Appellate District of Ohio found that the petitioners were not denied their Fourteenth Amendment rights when their complaint was dismissed as against the County and its agencies. The same question presented herein for review by this Court was also presented to the Supreme Court of Ohio. That Court, without an opinion, dismissed the petitioners' appeal for want of a constitutional question.

As a prelude to argument on the question presented for review herein, it should be noted that the appearance in the trial court of the state and county employees was pursuant to a Motion under Rule 12 (B), Ohio Rules of Civil Pro-

cedure, which the Trial Court granted. As a consequence there was no opportunity to present evidence or other information except the legal authorities submitted by those respondents and adopted by that Court and the Court of Appeals for the First Appellate District of Ohio, and affirmed by the Supreme Court of Ohio, in their decisions.

THE REASONS FOR GRANTING THE WRIT

The act of the Supreme Court of Ohio dismissing the appeal from the affirmance by the Court of Appeals for the First Appellate District of Ohio of the dismissal by the trial court of the complaint as to the state and county officials:

1. Is in conflict with the recent decision of this Court in *Scheuer* v. *Rhodes*, 416 U.S. 232, as well as the applicable law of the State of Ohio.

2. Effectively deprived the petitioners of their rights to Equal Protection and Due Process of Law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

ARGUMENT

In the course of its opinion affirming the dismissal of the state and county respondents on the ground of sovereign immunity, the Court of Appeals for the First Appellate District of Ohio states, Appendix C, page 8a, that the case at bar is distinguishable from the decision of this Court in *Scheuer* v. *Rhodes*, 416 U.S. 232. There is no such distinction, however. *Scheuer* v. *Rhodes* was decided less than one week prior to the trial court's decision in this case dismissing the named state and county officials. In *Scheuer*, the district court had dismissed the complaints for lack of

jurisdiction prior to the filing of any answer on the basis that the Eleventh Amendment to the Constitution of the United States was an absolute bar to prosecution of an action against a state official. Procedurally, at the appellate level, the *Scheuer* case was in exactly the same posture as this case before the Court of Appeals and Ohio Supreme Court, there being no answer filed by defendants and no evidence produced. The Supreme Court in *Scheuer,* after stating that the trial court had acted prematurely in dismissing the action stated in its second syllabus:

> "2. The immunity of officers of the executive branch of the state government for their acts is not absolute but qualified in a varying degree, depending upon the scope of discretion and responsibilities of the particular office and the circumstances existing at the time the challenged action was taken."
>
> 416 U.S. 232-33.

Concerning itself with a claim of damages against a person holding public office the *Scheuer* Court said:

> ". . . Damages against individual defendants are a permissable remedy in some circumstances not withstanding the fact that they hold public office. *Myers* v. *Anderson,* 238 U.S. 368. See generally *Monroe* v. *Pope,* 365 U.S. 167; *Moor* v. *County of Alameda,* 411 U.S. 693. In some situations a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another."
>
> 416 U.S. at 237-38.

The United States Supreme Court in *Scheuer* remanded the case to the trial court to permit plaintiffs therein to prove their claim of liability against the individual state officials. It is further within the constitutional power of

the legislature to relieve a public officer, and its sureties, from liability for a loss of funds by general tax after such liability has been incurred, or, where payment of the loss has been made, the legislature is empowered to reimburse the officer or surety from funds raised by general taxation. *State* v. *Swing,* 54 Ohio App. 251, 6 N.E.2d 999. See also, *Bauer* v. *North Arkansas Highway Improvement District No. 1,* 168 Ark. 220, 270 S.W. 533; *Bolivar Township Board of Finance of Benton County* v. *Hawkins,* 207 Ind. 171, 191 N.E. 158.

If it is the law of the State of Ohio, as determined by the Supreme Court of the United States in *Scheuer,* that elected state officials are not absolutely immune from acts done under color of office, there is no basis to conclude that county officials do not fall into the same category. It should be even more apparent that the county officials are not immune since no immunity was provided to them by constitution in the first place. Referring to the previous authorities whereby the financial obligations of state officials can be honored by the legislature, a county may likewise be authorized to settle a claim resulting from negligence. Aside from any statutes concerning this matter, it has been held that where the state inflicts an injury upon an individual for the reparation of which no law exists, and the facts incident thereto are not in dispute, and the legislature finds that a moral obligation rests upon the state to compensate the injured party for damages sustained, the legislature has full authority to provide, by special enactment, for the appropriation of public money to meet such moral obligations; and where the county is the active agent in causing the injury, a special act may confer on the Board of County Commissioners the power to pay such compensation from the general funds of the county. Such special enactments of the legislature do not contravene any of the pro-

visions of either the state or federal constitution. *Spitzig* v. *State,* 119 Ohio St. 117, 162 N.E. 394.

At the trial level these petitioners were precluded entirely from presenting any evidence of negligence on the part of any of the governmentally related defendants. At the very least they are entitled to make that effort and it is submitted that, during the trial involving the remaining defendants there was strong evidence that the school bus driver not only was untrained in the operation of the large vehicle she was charged with operating, but had complained frequently to her superiors of her inability to handle and manage the vehicle.

As noted, the Court of Appeals stated in its opinion, Appendix C, page 8a, that *Scheuer* is distinguishable on the basis that it involved a claim based on a violation of federal civil rights while the present case is grounded on the Ohio law of negligence. Such an immaterial distinction should not, however, be permitted to obscure the fact that the issue before the Supreme Court in *Scheuer* was not dependent upon any specific type of damages claimed. Rather, the question was whether state officials were absolutely immune from acts done under color of office. The entire thrust of the decision is toward the concept of immunity, and this Court should not sanction the limiting interpretation placed upon *Scheuer* by the Court of Appeals for the First Appellate District of Ohio. From the language of the *Scheuer* opinion, the doctrine of governmental immunity, or whatever remains of it after this decision, does not preclude the petitioners from seeking to establish the merits of their claims against the state and county respondents. *Cf.* 416 U.S. at 238.

The concept of governmental immunity as relied upon by the trial court is exemplified by the syllabus of the Supreme Court of Ohio in *Schaffer* v. *Board of Trustees,*

171 Ohio St. 228, in which it is stated that, without statutory authorization, a county and its agencies are immune from suits for negligence. The proposition is submitted, however, that that doctrine is judicially created and, as such, can be abrogated by the judiciary. *Thacker* v. *Board of Trustees,* 35 Ohio St.2d 49, 298 N.E.2d 542 at 552 (Brown, J., dissenting). In this context two decisions of the Supreme Court of Ohio are important: *Avellone* v. *St. John's Hospital,* 165 Ohio St. 467, 135 N.E.2d 410; and *Sears* v. *City of Cincinnati,* 31 Ohio St. 2d 157, 285 N.E.2d 732.

In *Avellone,* the action was brought against a non-profit hospital by a patient for negligent treatment by the hospital. The defense relied upon the then-accepted doctrine of charitable immunity. The Court held the hospital liable under the doctrine of respondeat superior for the torts of its servant. While this holding is significant in that it set aside a well accepted and judicially approve doctrine, it is more important from the standpoint of this petition as illustrative of the commitment every court has to consider, reconsider and change, where necessary, outmoded or impertinent concepts. As the court stated in *Clouston* v. *Remlinger, Inc.,* 22 Ohio St.2d 65, 258 N.E.2d 230, in abolishing the inability of a wife to claim her loss of services and consortium;

> "This is an archaic conclusion without reason, based originally upon the ancient concept that a wife was not a person, but at most a superior servant to her husband . . . that ancient concept is no longer valid." 258 N.E.2d at 234.

The *Avellone* court noted that its original ruling of 1911 establishing full immunity from liability of a non-profit hospital had been based on long standing and historical precedent. Nevertheless, it addressed itself to the question

of whether under the conditions existing at the time of its decision, there were any valid reason to perpetuate the doctrine;

> "The determination of such question involved simply the balancing of two single 'rights.' On the one hand there is the well recognized right of non-profit hospitals to any benefit and assistance which society and the law can justly allow them – a right which they command by their very nature; and on the other hand we see the right of the individual injured by the negligence of a servant to look for recompense to the master of such servant under respondeat superior. Up to this point in the development of the law, this Court has apparently felt that the benefit to society as a whole, gained by granting immunity, weighed the former right in favor of the latter, and this was on the grounds that such masters were 'different from others,' and that immunizing them was 'a valuable aid in securing the ends of justice.' In our opinion this conclusion is no longer justified."
>
> 135 N.E.2d at 414.

It is beyond argument that the doctrine of charitable immunity was a judge-made rule and was never codified in Ohio. *Avellone*, therefore, states that a judge-made rule can be abrogated judicially in the context of tort immunity.

This same principle was extended to governmental tort immunity in *Sears, Supra*. This was an action for damages alleged to have been caused by the negligence of an employee of a municipal hospital. The Court held that the defense of governmental immunity was not available to the municipality which owned the hospital and that the city was liable under the doctrine of respondeat superior. The Court stated:

> "In so holding, the Court necessarily overrules *Hyde* v. *Lakewood*, . . . specifically, it rejects the statement

> in paragraph two of the Syllabus that a legislative act is required to remove the governmental immunity in question. Rather, this Court approves the reasoning of Gibson, J., in his concurring opinion in *Hack* v. *Salem*, 174 O.S. 383, 396, 189 N.E.2d 857, wherein he stated:
>
> > 'Admittedly the General Assembly has the authority to change or abolish the rule of immunity created by this Court for municipal corporations in regard to their so-called governmental functions, but that in no way precludes this court from changing its own rule . . .' "
>
> 31 Ohio St.2d at 161, 162, 285 N.E.2d at 735.

Sears stands for the proposition that governmental immunity, as a creation of the courts, can be waived, notwithstanding that the legislature may have enacted statutes codifying the doctrine.

Petitioners are not unmindful of the decision of *Krause* v. *State*, 31 Ohio St.2d 132, 285 N.E.2d 736, appeal dismissed, 409 U.S. 10052, Reh. Den. 410 U.S. 918. This case involved a claim for wrongful death arising from the Kent State University incident in May, 1970. There, the Supreme Court recognized that the amendment of Article I, Section 16 of the Ohio Constitution in 1912 abolished sovereign immunity in Ohio. It then stated, however, that any consent given by the state to be sued was not self-executing but required an act of the General Assembly before the state could be subject to tort suit in Ohio.

In its opinion, Appendix C, page 9a, the Court of Appeals for the First Appellate District stated that while *Krause* held that the immunity of the state did not violate the equal protection clause of the United States Constitution, nor was the appellant there denied due process of

law, nothing in that case changed the law with respect to the immunity of counties.

The law of Ohio is clear that although the syllabus of a decision of the Supreme Court of Ohio states the law of Ohio, it must be interpreted with reference to the facts and issues presented to the Court. *Williamson Heater Co.* v. *Radis,* 128 Ohio St. 124, 190 N.E. 403. This principle emphasizes the fact that the *Krause* case affects this litigation only as to the State of Ohio and not as to the county employees. In practically inviting a different result in a case of this court, the Supreme Court in *Krause* felt impelled to state in a footnote:

> "11. Because different considerations apply when the governmental body is a city, town, village, county, etc., the holding in the instant case may not be dispositive of the question of governmental immunity. Accordingly, we intimate no opinion on their amenability to suit."
>
> 285 N.E.2d at 745.

It is further submitted that the Supreme Court of Ohio, in dismissing the appeal from the decision of the Court of Appeals for the First Appellate of Ohio affirming the dismissal of the state and county employees not only runs counter to the decision of the Supreme Court of the United States in *Scheuer* v. *Rhodes, Supra,* but also amounts to a denial of the petitioners' constitutional rights guaranteed them by the Fourteenth Amendment to the United States Constitution.

The concept that a five year old child who loses both her legs is entitled to full compensation if she is struck by a privately owned bus but is entitled to no compensation when a similar bus is operated by the state or county is totally repugnant to the Fourteenth Amendment to the

Constitution of the United States and represents an arbitrary and unreasonable distinction incompatible with her rights as a citizen of the United States. In *Krause, Supra,* the Court of Appeals found a denial of equal protection by the application of governmental immunity related to the acts of the State of Ohio. The Supreme Court of Ohio, in overruling the Court of Appeals, specifically excepted counties and other governmental entities from its decision when it stated:

> "Assuming that such observation refers to municipalities, or other political subdivisions, there are sufficient substantive differences between them and the state to allow for such different results."
>
> 285 N.E.2d at 745.

To further emphasize the inequality which exists in this case, the Court must consider recent legislation of the Ohio General Assembly which removes any immunity of the state from liability and represents the consent of the state to be sued. Petitioner Janene Riley is eligible for relief under this enactment but only against the state. As a result, the legislature has specifically done what the Supreme Court requested it to do in the first syllabus of *Krause,* but has avoided doing what the Supreme Court in *Krause* said was probably not necessary because of the distinction between counties and other political entities and the state. This anomaly establishes the absurd result now that the state and private persons can be responsible for their torts but counties can not. Can it be validly stated that the class of persons injured by the negligence of private individuals or state employees is in fact different from the class of persons who are injured by the negligence of the county or county employees? To raise the question is to answer it. This Court, in *Yick Wo* v. *Hopkins,* 118 U.S. 356, speaking of discriminating laws, said:

> "Though while itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."
>
> 118 U.S. at 373-74.

The law as it now stands in the State of Ohio is not even "fair on its face" and is not "imparital in appearance." Under those circumstances it is the duty of the Court to strike down the law. *Baker* v. *Carr,* 369 U.S. 186.

The paramount theory behind the concept of governmental immunity has been that public funds ought not be diverted to individual claimants in the form of compensation for wrongs done them by governmental employees. This argument was disposed of in *Avellone, Supra,* touching on another area of immunity by recognizing the availability of liability insurance coverage. The General Assembly of the State of Ohio has similarly recognized the function of insurance. In a concurring opinion in *Hack* v. *Salem,* 174 Ohio St. 383, 189 N.E.2d 857, involving immunity of a municipality, Justice Gibson stated:

> "To raise the question of whether the municipality or the injured individual is better able to bear the cost is to answer it. The municipality, which is able to spread the cost of an injury among its tax paying residents, is in a much better position in the vast majority of cases, than the injured individual, who must bear such loss from his own resources."
> 189 N.E.2d at 868.

The opinion of Justice Traynor in *Muskopf* v. *Corning Hospital District,* 359 P.2d 457, offers the most systematic, effective and persuasive rebuttal of any justification for the

doctrine of governmental immunity. He concludes that such immunity is an anachronism without sound legal basis, and owes its existence solely to the forces of inertia. Obviously, as previously stated, the Supreme Court of the United States in *Scheuer,* the General Assembly of the State of Ohio, and at least Supreme Court Justices Corrigan, Brown, and Williams feel exactly the same way.

In its capacity as an obsolete holdover from earlier times, application of the doctrine of governmental immunity results in classifications that discriminate with respect to the rights of individuals to redress their wrongs. In depriving individuals of such fundamental rights without any substantial justification for its existence it creates an invidious discrimination prohibited by the 14th Amendment of the United States Constitution. cf *Shapiro* v. *Thompson,* 394 U.S. 618; *Reynolds* v. *Sims,* 377 U.S. 533.

Thus, the statement in the opinion of the Court of Appeals (App. C. page 8a), after its discussion of *Schaffer* v. *Board of Trustees, Supra,* that the rationale of that case "is that counties are local subdivision of the state and are likewise immune from suit" flies in the face of the earlier-quoted footnote 11 in the *Krause* opinion. The Supreme Court of Ohio indicated in that footnote that it was not expressing an opinion as to the amenability to suit of such entities. Petitioner submits that there are no substantive differences between a state and counties or other political subdivisions to allow for different results as to them.

Therefore, the action of the trial court in dismissing the appellants involved in this proposition of law, which action was affirmed by the Court of Appeals and the Supreme Court of Ohio has deprived Janene Riley of her rights to due process and equal protection of the law which she, as an innocent victim of activity totally unrelated to any essential government function, should not be required to suffer.

CONCLUSION

The instant case presents a clear example of the misapplication by the state courts, including the Supreme Court of Ohio, of the decision of this court in *Scheuer* v. *Rhodes*. In law and in fact this case dramatically emphasizes the injustice which can result from a blind adherence to legal precedents without recognition of underlying limitations and qualifications. This is not the unique case of government operating in a quasi-military situation as in *Krause* but involves routine daily activity for which the State of Ohio and its counties should be held just as accountable as any other citizen performing the identical activity. The *Scheuer* decision states that, in any event, a citizen has a right to proceed personally against state and county officials to establish their personal, as contrasted with imputable, negligence. Finally, there can be no justification for discriminating between the rights Janene Riley has when struck by a governmentally operated vehicle from those she would have if struck by any other commercial type vehicle, and the act of the Supreme Court of Ohio in dismissing the appeal from the affirmance of the trial court's dismissal of the state and county employees on the ground of sovereign immunity has effectively denied the petitioners their rights to equal protection and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted.

Leo J. Breslin.
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APPENDIX A

THE SUPREME COURT OF OHIO
1976 TERM
To wit: February 5, 1976

No. 75-1073

THE STATE OF OHIO,)
)
City of Columbus.)

JANENE RILEY ET AL.,
Appellants,

vs.

BETTY STEPHENS ET AL.,
Appellees.

APPEAL FROM THE COURT OF APPEALS FOR WARREN COUNTY

(Filed ————)

This cause, here on appeal as of right from the Court of Appeals for Warren County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certi-

fied to the Clerk of the Court of Appeals for Warren County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....

..... Clerk

..... Deputy

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO
1976 TERM
To wit: February 5, 1976

No. 75-1073

THE STATE OF OHIO,)
)
City of Columbus.)

JANENE RILEY ET AL.,
Appellants,

vs.

BETTY STEPHENS ET AL.,
Appellees.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR WARREN COUNTY TO CERTIFY ITS RECORD

(Filed ————)

It is ordered by the Court that this motion is overruled.

COSTS:
Motion Fee, $20.00, paid by Lindhorst & Dreidame

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
WARREN COUNTY, OHIO

No. CA 31

JANENE RILEY, by and through her mother and next friend DELORES RILEY, and
DELORES RILEY,
Plaintiffs-Appellants,

vs.

BETTY STEPHENS, et al,
Defendants-Appellees.

OPINION

(Filed September 15, 1975)

APPEAL FROM THE COURT OF COMMON PLEAS WARREN COUNTY, OHIO

Messrs. Lindhorst and Dreidame, Leo J. Breslin of counsel, 1200 American Building, Cincinnati, Ohio 45202, for Plaintiffs-Appellants.

Messrs. Beiser, Greer and Landis, Leo J. Krebs of counsel, 8 North Main Street, Dayton, Ohio 45402, for Defendant-Appellee, Shell Oil Company.

Mr. Edward J. Utz, Fourth and Walnut Street, Cincinnati, Ohio 45202, for Defendants-Appellees, Warren County Employees,

Attorney General of State of Ohio, Columbus, Ohio 43215, for Defendants-Appellees, State Employees.

BUZZARD, J.

Plaintiff, a seven year old child, was grievously injured when a bus carrying Green Knoll Retarded Children, ran off the highway and struck her. The parents of plaintiff were apparently separated and each filed suit on behalf of their minor daughter. The actions were consolidated and judgments were entered on the verdicts against Stephens (driver of the bus) and the Loveland Oil Company. Plaintiff appeals and contends the court erred in dismissing defendants State of Ohio, Warren County Commissioners, Warren County Board of Mental Retardation, Green Knoll School and Shell Oil Company prior to trial.

It is contended by appellant that the driver of the oil truck was the servant of the Loveland Oil Company and of Shell Oil Company. Shell denies the agency, as does Loveland. The various state and county boards claim governmental immunity. The question then is whether the trial court was in error in dismissing these defendants prior to trial.

The appellant urges two assignments of error, as follows:

NO. 1. The trial court erred in granting the motion for summary judgment of the State of Ohio and its employees, directors of the Department of Rehabilitation and Correction and of the Department of Mental Health and Mental Retardation, all past and present members of the Board of County Commissioners of Warren Coun-

ty, Ohio, all past and present members of the Warren County Board of Mental Retardation and Green Knoll School based upon the "concept of official governmental immunity" for the following reasons:

a. The doctrine of governmental immunity has been judicially created and, as such, it can be abrogated by the judiciary.

b. The doctrine of governmental immunity is no longer an automatic bar to claims for damages against State, County or Board of Education officials.

c. If the doctrine of governmental immunity is effective, the General Assembly of the State of Ohio has waived such doctrine as to the operation of schools and school bus systems by the State, County and Boards of Education by passage of legislation relating to the purchase and maintenance of liability insurance.

d. The application of the doctrine of sovereign immunity is a denial of the appellants' rights to equal protection and due process of law guaranteed by Article XIV, Section I, of the Constitution of the United States of America and Article I, Section 16 of the Constitution of the State of Ohio.

e. The application of the doctrine of governmental immunity in this case is against the public policy of the State of Ohio and deprives appellants of rights guaranteed to them by Am. Sub. H.B. No. 800 effective January 1, 1975.

NO. 2 The trial court erred in granting the motion for summary judgment of defendant, Shell Oil Company, for the reason that it deprived appellants of the entitlement to have the evidence before the court on said

motion construed most strongly in their favor pursuant to Rule 56 (C), C.R.P., and that, at that stage of the proceedings, reasonable minds could reasonably differ concerning the imputability of negligence by defendant, John Daunt and/or defendant, Loveland Oil, Inc. to Shell Oil Company.

It has long been the settled law of this state that the State of Ohio is not subject to suits in tort in the courts of this state without the consent of the General Assembly, and this includes state boards and agencies.

Raudabaugh v. *State*, 96 Ohio St. 513

Palumbo v. *Industrial Commission*, 140 Ohio St. 54

State Ex Rel. Williams v. *Glander*, 148 Ohio St. 188

Wolf v. *Ohio State University Hospital*, 170 Ohio St. 49

Thacker v. *Board of Trustees of Ohio State University*, 35 Ohio St. 2d 49

Likewise, that Article I, Section 16 of the Ohio Constitution is not self executing and statutory consent is a prerequisite to such suit.

This doctrine of governmental immunity was challenged in the recent case of *Krause* v. *State*, 31 Ohio St. 2d 132. The Ohio Supreme Court was importuned to overrule such doctrine. The Court then proceeded to extensively reexamine the doctrine of sovereign immunity, particularly in the light of the history of Article I, Section 16, and reached the same conclusion as in the earlier cases cited herein. Appellant argues that the doctrine of govern-

mental immunity has been judicially created and, as such, it can be abrogated by the judiciary. It would be judicial insubordination for this Court to ignore these confirmed decisions of the Supreme Court. If this doctrine is to be abrogated judicially, it will have to be done by the Ohio Supreme Court.

Appellant says that the claim of sovereign immunity is no longer an automatic bar to claims against the State and cites the case of *Scheuer* v. *Rhodes,* 416 U.S. 232, 40 L. Ed. 2d 90 in support. The *Scheuer* case is distinguishable from the case at bar. It was based on the Federal Civil Rights law while the present case is grounded on the Ohio law of negligence. The Third Amended complaint makes no allegations invoking any federal rights which would justify the Federal Courts taking jurisdiction in spite of the Eleventh Amendment to the United States Constitution. We do not read the *Scheuer* case to mean that motions to dismiss for failure to state a claim, or motions for summary judgment, in State negligence actions, can no longer be sustained where appropriate. It is only to be read in the light of its own facts and where the action is grounded on a deprivation of federal statutory or constitutional rights.

Appellant claims that the State has waived its immunity in certain areas by legislation authorizing the purchase of liability insurance. Reference to the statutes cited reveals that the statutes deal with coverage of motor vehicles and school buses, and are for the protection of employees who might be primarily liable in tort, and of school children riding the buses. They do not appear to insure the political subdivision or the State. The driver of a State owned vehicle may be primarily liable in tort, even though his employer is protected by governmental immunity and the State does not waive its own immunity by protecting its employees, and school children.

Furthermore, there can be no waiver of immunity by implication. The consent to be sued, mentioned in Article I, Section 16 contemplates an express consent.

> See *Karr Construction Company* v. *Department of Natural Resources* (No. 9579 — Franklin County Court of Appeals, 1970).

It is significant to note that Syllabus three of *Krause* says that the consent to be sued must be statutory. It does not mention implied consent.

It is argued that the doctrine of sovereign immunity is a denial of appellants' rights to equal protection and due process of law guaranteed by Article 14, Section 1 of the United States Constitution. The Court held in *Krause* that the immunity of the State did not violate the equal protection clause of the United States Constitution. Neither was appellant denied due process of law. Her claim against the State was processed and dismissed because the General Assembly at that time had not consented by statute that the State could be sued. This decision of the State Court does not offend the Fourteenth Amendment with respect to due process. A litigant is not denied due process just because his claim is dismissed where it states no claim as a matter of law against the State.

But, appellant says the doctrine of sovereign immunity with reference to counties is not the same as against the State and points to note (11), page 146, of the *Krause* case. This note is in the nature of a caveat and does not change the law with respect to the immunity of counties.

> "In the absence of statutory authorization therefor, a County or its agencies are immune from suit for negligence."
>
> *Schaffer* v. *Board of Trustees of Franklin County Veterans Memorial,* 171 Ohio St. 228

The rationale is that counties are local sub-divisions of the State and are likewise immune from suit except where R.C. § 305.12 specifically imposes liability on the counties for failure to keep roads or bridges in repair. We are compelled to follow the *Schaffer* case.

We find appellant was not denied her Fourteenth Amendment rights when her complaint was dismissed as against the county and its agencies, which include the County Commissioners of Warren County and the Green Knoll School for Retarded Children and its Board of Trustees.

It is contended by appellant that the General Assembly has now changed the public policy in this State as regards immunity of the sovereign, by the passage of Am. Sub. H.B. No. 800, codified as Chapter 2743 of the Revised Code. The State may now be sued in the court of claims, effective January 1, 1975. R.C. § 2743.01 defines "State" and says that it does not include political subdivisions. "Political subdivisions" is defined to include counties. The appellant reasons that if the General Assembly has granted consent to sue the State, then this establishes the public policy of the State and therefore, counties should no longer be immune. We reject this reasoning. If the General Assembly had desired to broaden Chapter 2743 it could have very easily granted the power and right to sue counties. The public policy with respect to counties has not been changed by the passage of Chapter 2743 R.C.

Appellant complains that the trial court erred in granting summary judgment in favor of Shell Oil Company. John C. Daunt was the driver of an oil truck which delivered heating oil to various customers. Daunt's truck was involved in the accident along with the school bus. The question was whether Daunt was an employee of the Loveland Oil Company who supplied him with the oil or whether he was an independent contractor operating his own business. Loveland Oil Company had a contract with Shell Oil Company for the purchase of its oil and gas requirements and this contract was known as a Jobbers Sales Contract. There appeared on Daunt's truck a logo or decal of the Shell emblem and appellant argues this created an inference that the truck belonged to Shell and was being operated in its business at the time of the accident; that a prima facie case was made out which would support a finding of liability against Shell. This appears to be the present rule, although the inference or presumption is rebuttable.

McDougall v. *Glenn Cartage Company*, 169 Ohio St. 522

Cincinnati Transit, Inc. v. *Tapley, et al*, 28 Ohio App. 2d 26

The question of Shell's liability arose on motion for summary judgment. Civil Rule 56 (E) provides in part that:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In support of such motion, Shell submitted the affidavit of A. W. Kanacz, former area manager of Shell and also his answers to certain interrogatories. There were also considered the answers to interrogatories by John C. Daunt, the deposition of John C. Daunt and the deposition of

Edgar A. Runyon, Vice-president and General Manager of Loveland Oil Company, Incorporated. This supporting data shows that John C. Daunt owned the truck and he personally repaired and maintained it. He carried his own insurance on the truck. He was never employed by Loveland Oil, received no pay or fringe benefits from them and no W-2 wage form. He had no written contract with Loveland. He purchased his requirements from Loveland and then sold to his own customers, billing them with his own invoices and statements. Loveland had no control over his deliveries and didn't deal with his customers, except occasionally by mistake. He never had any agreement with Shell nor did he ever have contact with their representatives. He did not own any stock in Loveland nor were there any Loveland name or markings on his truck. Loveland did own three trucks of its own which were used to deliver gasoline to its retail customers. The only evidence connecting Daunt with Shell Oil was the emblem of Shell on Daunt's truck, placed there by Shell.

Is the presumption created by such name or emblem sufficient to withstand the force of the evidence against it? We do not think so. After considering all the evidence submitted on the hearing on motion for summary judgment, we think the trial court was correct in sustaining such motion. The evidence is so overwhelmingly in support of the motion that reasonable minds could not fairly conclude that the presumption should stand.

See *Brunny* v. *Prudential Ins. Co.*, 151 Ohio St. 86
Hurt v. *Charles J. Rogers Transportation Co.*,
164 Ohio St. 329, 21 O Jur 2d 108 § 102

With the removal of the presumption and giving appellant the benefit of every reasonable inference, there is no genuine issue as to any material fact involving Shell.

This Court has considered the cases of *Cincinnati Transit, Inc.* v. *Tapley*, 28 Ohio App. 2d 26 and *Clark* v. *Becker Discount Drug Co.*, C-74187, First District (2-18-75) cited in appellants' Reply Brief. In the *Tapley* case the defendant failed to offer any evidence to rebut the prima facie case against him. In the *Clark* case there was an apparent question of material fact whether plaintiff was aware of the hazard. These two cases thus differ from the case at bar.

Appellant also cites *Cleveland* v. *Keah*, 157 Ohio St. 331 which was not a summary judgment case. We do not interpret this case to mean that in any case where there is a presumption or prima facie case, that the case must automatically be submitted to a jury. If this were true, summary judgment would be inappropriate in all such cases. The true test is whether reasonable minds might differ as to the existence of a genuine issue as to a material fact.

This Court has been importuned by appellant to remove the "stigma" of the trial court's rulings sustaining the motions for summary judgment and for dismissal. The Court can only act on the record. The fact that the law was changed as to immunity for the State effective January 1, 1975, does not authorize or warrant the Court in setting aside proper legal orders of the trial court.

Accordingly, the court finds that the assignments of error are not well taken and the judgment is affirmed.

CRAWFORD, P. J. AND WHITESIDE, J., CONCUR.

CRAWFORD, P. J. AND BUZZARD, J., RETIRED, AND ASSIGNED TO ACTIVE DUTY UNDER AUTHORITY OF SECTION 6(C), ARTICLE IV, CONSTITUTION.

WHITESIDE, J. OF THE TENTH APPELLATE DIS-

TRICT SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

PLEASE NOTE:

The Court will place of record its own entry in the within cause within ten days from the release of this Opinion.

APPENDIX D

COURT OF APPEALS
FIRST APPELLATE DISTRICT
WARREN COUNTY, OHIO

No. CA 31

JANENE RILEY, BY AND THROUGH HER MOTHER AND NEXT FRIEND DELORES RILEY, AND DELORES RILEY,

Appellants,

vs.

BETTY STEPHENS, SHELL OIL CO., LOVELAND OIL CO., WARREN COUNTY EMPLOYEES, AND STATE OF OHIO EMPLOYEES,

Appellees.

JUDGMENT ENTRY

(Filed September 5, 1975)

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Warren County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Opinion filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Warren County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Warren County, Ohio, for execution upon this judgment

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellants by his counsel, excepts.

APPENDIX E

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

Case No. 31556

JANENE RILEY, et al,
Plaintiffs,

vs.

BETTY STEPHENS, et al,
Defendants.

DECISION AND JUDGMENT ENTRY

(Filed ————)

This matter is before the Court upon a Motion for Summary Judgment on behalf of the defendant, Shell Oil Company, and against the plaintiffs. Plaintiffs predicate their claim against the defendant, Shell Oil Company, on the contention that the plaintiff's injuries were caused by the defendant, John C. Daunt, and that at the time of the injuries the said John C. Daunt was an employee of Shell Oil Company and was driving the said truck in the scope of his employment for Shell Oil Company.

For the purpose of this motion the Court has before it the pleadings, the memoranda of the respective parties, the answers to interrogatories and affidavits of Shell Oil Company and the defendant, John C. Daunt. The Court is of the opinion that there is no genuine issue as to any

material fact for the same reasons as set out by this Court in its decision of March 24, 1971, in a companion case of *Walker* v. *Loveland Oil Inc., et al,* Case No. 32294.

In the instant case plaintiffs have raised the additional argument that they are entitled to the benefit of an inference to the effect that defendant, Shell Oil Company, was the owner of the subject truck and that it was being used in the business of Shell Oil Company. For this contention plaintiff cites the twin cases of *McDougall* v. *Glenn Cartage Company,* 169 O.S. 522, and *Cincinnati Transit Inc.* v. *Tapley,* 28 O.App. 2d 26. This Court is of the opinion that the instant case must be distinguished from those two decisions. In each of those cases the Court had before it no direct evidence whatsoever as to the ownership and employment of the vehicle in question, and therefore, was obliged to permit plaintiff the inference that the vehicle was owned and used in the business of the person whose name appeared on the truck. It is true that the evidence before the Court in the instant case shows that the only markings on the truck were the word "Shell". However, there is additional evidence as to the matter of ownership and employment before the Court. Defendant Daunt says that he alone owned the truck. Defendant, Shell Oil Company, says that Daunt alone owned the truck. Defendant Daunt says that the truck was being operated in his own business and not that of Shell Oil Company. Shell Oil Company says that it had no connection with the operation of the truck whatsoever. Plaintiffs have submitted no evidence or facts to the Court to refute any of these statements. To permit an inference that would be exactly contrary to the established evidence appears to this Court to be beyond the reasoning or the decision of the Supreme Court in *McDougall* v. *Glenn Cartage Company,* Supra.

Therefore, the Court concludes that there is no genuine issue as to any material fact and that defendant, Shell Oil Company, is entitled to judgment as a matter of law. The Motion of said defendant is sustained and judgment will be entered in its behalf.

Exceptions of the plaintiffs are reserved.
Dated: June 6, 1972.

/s/ P. DANIEL FEDDERS
Judge

[Judgment Entry will be filed as of June 9, 1972]

CC: Lindhorst & Dreidame
Leo F. Krebs
Edward J. Utz
Brumleve, DeCamp & Wood
William L. Bubenzer
Altick, McDaniel & Radabaugh

APPENDIX F

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

Case No. 31556

JANENE RILEY, et al.,
Plaintiffs,
vs.
BETTY STEPHENS,
Defendant.

Case No. 34697

JANENE RILEY, et al.,
Plaintiffs,
vs.
KENNETH B. GAVER,
Defendant.

DECISION AND JUDGMENT ENTRY

(Filed ————————)

Fedders, J.:

The Defendant Shell Oil Company is hereby dismissed as a party Defendant to the Third Amended Complaint

for the reasons set out by the Court in its decision of June 9, 1972.

/s/ P. DANIEL FEDDERS
Judge

April 22, 1974.

ss: Leo J. Breslin, Esq.
Edward J. Utz, Esq.
Wilson Brumleve, Esq.
Hugh Altick, Esq.
John J. Adams, Esq.
Leo F. Krebs, Esq.
Peter Swenty, Esq.

APPENDIX G

COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

Case No. 31556

JANENE RILEY, by and through her mother and next friend DELORES RILEY, et al.,
Plaintiffs,

vs.

BETTY STEPHENS, et al.,
Defendants.

Case No. 34697

JANENE RILEY, by and through her father and next friend, ROBERT L. RILEY, JR.,
Plaintiffs,

vs.

KENNETH B. GAVER, M.D., et al.,
Defendants.

JUDGMENT ENTRY

(Filed May 15, 1974)

The jury, on a former day, having found the issues in this consolidated case in favor of plaintiff Janene Riley in the sum of Two Million ($2,000,000.00) Dollars and

costs, and in favor of the plaintiff, Robert L. Riley, Jr., in the sum of Thirty Thousand ($30,000.00) Dollars, and costs, against Betty Stephens and Loveland Oil Company, judgment is herewith rendered in favor of plaintiff Janene Riley in the sum of Two Million ($2,000,000.00) Dollars and costs, and in favor of the plaintiff, Robert L. Riley, Jr., in the sum of Thirty Thousand ($30,000.00) Dollars and costs, against each of said defendants.

.....

Judge Fedders

.....

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.....

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.....

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APPENDIX H

COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

Case No. 31556

JANENE RILEY, et al.,
Plaintiffs,
vs.
BETTY STEPHENS, et al.,
Defendants.

Case No. 34697

JANENE RILEY, et al.,
Plaintiffs,
vs.
KENNETH B. GAVER, M.D., et al.,
Defendants.

ENTRY OVERRULING MOTIONS OF DEFENDANT LOVELAND OIL COMPANY FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR A NEW TRIAL

(Filed August 5, 1974)

This matter coming before the Court upon the motions of defendant Loveland Oil Company for judgment not-

withstanding the verdict, and for a new trial, the Court, being fully advised in the premises and after oral argument and submission of briefs, finds said motions, and each of them, not well taken and denies same.

The judgment in the within cause heretofore entered on May 13, 1974, is herewith reaffirmed.

Exceptions to defendant Loveland Oil Company.

/s/ P. DANIEL FEDDERS
Judge

/s/ LEO J. BRESLIN
LINDHORST & DREIDAME
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421-6630

/s/ JOHN J. ADAMS
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Kettering, Ohio 45429

APPENDIX I

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

Case No. 31556

JANENE RILEY, et al.,
Plaintiffs,
vs.
BETTY STEPHENS,
Defendant.

Case No. 34697

JANENE RILEY, et al.,
Plaintiffs,
vs.
KENNETH B. GAVER,
Defendant.

DECISION AND JUDGMENT ENTRY

(Filed ————————)

Fedders, J.:

This matter is before the Court upon Motions for summary judgment and Motions to dismiss filed by the various Defendants against the complaints filed in these two cases.

From the voluminous pleadings, memoranda, interrogatories, stipulations of fact and pre-trial conferences, it is obvious that the Plaintiff's complaint against these moving Defendants is grounded in the theory that the Defendant Betty Stephens, school bus driver, was either directly or indirectly an employee of one or more of the various Defendants. All of the moving Defendants are governmental agencies of either state or county level.

The Court can find nothing in the allegations of fact or legal arguments so far submitted by which this case can be excluded from the concept of official governmental immunity embodied in the cases of *Schaffer* v. *Board of Trustees,* 171 O.S. 228; *Commissioners of Hamilton County* v. *Mighels,* 7 O.S. 109; *Tinsley* v. *Cincinnati, et al,* 5 O.O. (2d) 454; *Broughton* v. *Cleveland,* 167 O.S. 29.

The Court therefore concludes that there is no genuine issue as to any material fact and that the complaint fails to state a claim against these moving Defendants upon which relief can be granted.

The following Defendants are dismissed:

State of Ohio — Bennett J. Cooper, Director, Department of Rehabilitation and Correction

State of Ohio — Dr. Kenneth Gaver, Director, Department of Mental Health and Mental Retardation

All past and present members of the Board of County Commissioners of Warren County, Ohio

All past and present members of the Warren County Board of Mental Retardation

Greenknoll School

April 22, 1974.

/s/ P. DANIEL FEDDERS
Judge

cc: Leo J. Breslin, Esq.
Edward J. Utz, Esq.
Wilson Brumleve, Esq.
Hugh Altick, Esq.
John J. Adams, Esq.
Leo F. Krebs, Esq.
Peter Swenty, Esq.